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In The
Supreme Court of the United States

October Term, 1956

No. ~~1056~~ 162

PHILLIPS PETROLEUM COMPANY,
a Corporation,
Petitioner,

VERSUS

MAYOE PORTER BUSTER and THE HITCH LAND AND CATTLE COMPANY, a Corporation, HARRY M. HITCH and BILL LOGSDON,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

RAYBURN L. FOSTER,
HARRY D. TURNER,
R. M. WILLIAMS,
WILLIAM J. ZEMAN,
Bartlesville, Oklahoma;
CECIL C. HAMILTON,
REFORD BOND,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

JUNE, 1957.

KING LAW BRIEF CO., 222 N.W. THIRD, OKLAHOMA CITY, — PHONE FO 5-2969

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MAYOE PORTER BUSTER and THE HITCH LAND AND CATTLE COMPANY, a Corporation, HARRY M. HITCH and BILL LOGSDON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Phillips Petroleum Company ("Phillips") prays that Writ of Certiorari issue to review two judgments of the United States Court of Appeals for the Tenth Circuit affirming two judgments of the United States District Court for the Western District of Oklahoma enjoining

Phillips from disconnecting respondents' gas line and from refusing to supply natural gas to the respondents (plaintiffs) at a reasonable price during the continuance of irrigation by the plaintiffs from gas produced on their land of such amount of gas as is reasonably necessary for such irrigation.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A hereof), written by Chief Judge Bratton, concurred in by Judge Pickett, with Judge Lewis specially concurring, is reported in 241 F. 2d 178.

The opinion of the District Court for the Western District of Oklahoma (R. 23) is reported in 139 F. Supp. 594.

JURISDICTION

The judgments of the Court of Appeals were entered on January 2, 1957 (Appendix B). Petition for rehearing was filed January 21, 1957, and denied March 5, 1957 (Appendix C).

Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

The area superintendent of Phillips told the plaintiffs that Phillips would furnish them gas for irrigation pur-

poses but there was no discussion as to the terms upon which or the period during which the gas would be furnished other than by a reference to a printed form contract under which other landowners in the area had obtained gas from Phillips and which provided for termination by either party. The trial court found that the area superintendent was apparently authorized to make such representations and that the plaintiffs had expended sums of money in reliance on those representations and on the custom of Phillips to furnish gas. The judgment of the District Court enjoined Phillips from refusing to supply gas during the continuance of irrigation, from gas produced on the plaintiffs' land, at a reasonable price and in amounts reasonably necessary for said irrigation. The Court of Appeals affirmed the judgments on the theory that Phillips had an obligation which arose out of an estoppel and that it could be enforced by injunction without reference to the law regarding specific performance of obligations. The Court of Appeals also held that it was unnecessary that there be any mention of term, price or quantity of gas to be furnished in order to have an enforceable obligation.

Questions presented are:

1. Whether an oral unilateral promise to sell a commodity may be enforced as a continuing obligation to sell personalty when the term, price and quantity of the alleged obligation are not specified.

2. Whether a promise may be enforced under the doctrine of promissory estoppel when it would be unenforceable under ordinary contract law because of indefiniteness.

3. Whether an injunction against breach of an alleged obligation may be granted under facts which would not permit of specific performance.

4. Whether such judgment violates Rule 65(d) by failure to be specific in terms[1].

---

[1] If the Writ is granted other questions presented are: (1) Whether Phillips' area superintendent was apparently authorized to represent that Phillips would furnish gas for a perpetual term; (2) Whether the statements of Lewis were unenforceable by reason of being a mere contract to make a contract; (3) Whether the alleged oral contract was within the Statute of Frauds; (4) Whether the doctrine of promissory estoppel is the law in Oklahoma; (5) Whether the elements of an estoppel are present; (6) Whether the alleged oral contract or promissory estoppel is unenforceable for want of mutuality of obligation and remedy; (7) Whether the plaintiffs, as a matter of law, could reasonably rely on the representations of the Phillips' area superintendent; (8) Whether the plaintiffs could reasonably rely on a perpetual term, the area superintendent having made no reference to a term; (9) Whether a promissory estoppel requires that the promissor reasonably expect reliance on the promise by the promisee.

STATEMENT

These two cases were originally filed by the respondents in the state district court of Texas County, Oklahoma, and on the ground of diversity of citizenship were removed by Phillips to the federal court (R. 5, 237).

Although the two cases were filed at the same time, against the same defendant and involving the same general subject matter, and for that reason consolidated for trial, the plaintiffs and the facts relied on for relief are different in each case.

Because of the single record and to avoid duplication in respect to matters that are common to both cases, a single brief was filed in the Court of Appeals, covering these two cases in addition to two other cases which are not here involved. This petition prays for reversal of both cases.

General Circumstances

In each case plaintiffs are the owners or tenants of land in Texas County, Oklahoma, on which Phillips is operating a gas well under an oil and gas lease. Plaintiffs' rights are subject to said leases and the only right to the gas which the plaintiffs have under their leases is the express reservation of gas for domestic purposes in the principal dwelling house on each lease (R. 126).

Phillips produces gas over a large area in the vicinity of plaintiffs' land and all of this gas is dedicated by

contract and sold by Phillips to Panhandle Eastern Pipe Line Company after processing by Phillips (R. 136).

Beginning in 1950 Phillips began to receive requests for gas to operate engines used by Phillips' lessors to pump water for irrigation. As an accommodation, and with the acquiescence of Panhandle Eastern, Phillips contracted to furnish gas to eight of its lessors in Oklahoma and Texas, utilizing for this purpose a printed form of contract which provided that the gas sold should not exceed 1% of the gas produced and also providing that the contract was terminable by either party at the end of each annual period on thirty days' notice (R. 131-132). Other than in those eight instances Phillips was not in the business of distributing gas, but only produces, gathers, processes and sells gas to interstate pipe line purchasers (R. 136).

The plaintiffs herein began to use Phillips' gas to irrigate, pursuant to transactions which will be described later. Other persons, who were plaintiffs in two cases consolidated for trial with the two cases at bar, connected their lines to Phillips' wells and began to take gas, relying on an alleged custom and usage.

In 1953, it began to appear to Phillips that the demand for irrigation gas would increase until Phillips would be unable to supply irrigation gas and comply with its previous commitments. Phillips determined that it must cease to furnish irrigation gas for the reasons that

the gas was committed for the life of production, that it was required in the manufacture of gasoline and that Phillips did not wish to engage in the business of distributing gas. The plaintiffs were informed that they must disconnect from Phillips' gas well (R. 134-136).

Suits were filed seeking to permanently enjoin Phillips from disconnecting the plaintiffs' irrigation gas lines from Phillips' wells. A trial was had, and judgments were rendered for plaintiffs. The Court of Appeals affirmed and a rehearing was denied.

Facts Peculiar to the Hitch Land Company Case

In the *Hitch Land Company* case, one Lewis, the area superintendent of Phillips, was visited by two of the plaintiffs in January of 1953. Lewis told the plaintiffs that Phillips would make gas available to them, that several farmers there were using gas for irrigation and that there would be a contract to be signed; that if the plaintiffs didn't have water there wouldn't be any use to sign the contract, and if they did, that a contract could be negotiated later (R. 64, 75, 78). The terms of the contract were not mentioned nor were they ever discussed or negotiated (R. 64, 80). At all times the plaintiffs were willing to pay the field price for gas supplied to them (R. 73, 76). The plaintiffs drilled an irrigation well, laid a line to Phillips' gas well and Phillips connected their line

(R. 83). In July, 1953, Phillips gave notice to the plaintiffs that they must disconnect from the gas well.

Facts Peculiar to the Buster Case

Buster knew that others were using natural gas for irrigation in his area and that they had signed contracts with Phillips to purchase the gas (R. 99, 104), but he did not know the terms of the contracts under which Phillips furnished the gas. He made no inquiry as to the terms under which the gas was supplied but began to drill a water well (R. 100). Just before completion of this water well, during the latter part of December, 1952, or the first part of January, 1953, Lewis, Phillips' area superintendent, talked with Buster and told him to connect his irrigation well to Phillips' gas well and that he (Lewis) would put a meter on and bring a contract by for Buster to sign (R. 100-101). The terms of a contract were not discussed (R. 94, 104), except possibly the price (R. 95, 105). Buster then bought equipment to operate his well, laid a line and connected it to Phillips' gas well.

In May, 1953, Lewis brought contract forms to Buster, who objected to the clauses limiting the gas to be furnished to 1% of production and allowing Phillips to terminate on thirty days' notice at the end of every contract year (R. 100-101). The plaintiffs later signed the contract (R. 95, 101) after Lewis informed them that

some lessors were being cut off in Texas. Phillips never executed the contract, but gave notice in July, 1953, that plaintiffs must disconnect their line.

Plaintiffs admitted that Lewis' assurance that gas would be available was not the reason for drilling the well (R. 97-98, 103-104).

Theories of the Courts Below

The District Court for the Western District of Oklahoma (133 F. Supp. 594, R. 23) concluded that Lewis had apparent authority to bind his company in the alleged oral contracts for the reason that these plaintiffs recognized Lewis as Phillips. The trial court was cognizant of the fact that Lewis had stated that later written contracts would be provided (R. 34), but apparently was of the opinion that Lewis' statement that the plaintiffs should go ahead and drill the wells and that gas would be furnished was enough to make nugatory his statements that it would be necessary to sign a contract later.

In short, the theory of the trial court was that there was an oral contract between Phillips and the plaintiffs to the effect that "You dig your wells, we'll furnish the gas." (R. 34.)

The Court of Appeals then adopted a theory of promissory estoppel, thus avoiding the objection that there had been no consideration for the promise of Lewis.

At this point the Court of Appeals was in the position of having a promise to enforce but of being without sufficient terms to make it definite and certain enough to be enforceable, had the promise been made pursuant to a simple contract. There was only the bare statement in each case that Phillips would furnish gas (R. 70).

Phillips urged various defenses which must have prevailed if the asserted obligation was to be treated as an ordinary contract, but the Court of Appeals found that the law of contracts would not apply since these were cases of estoppel, and that the law of specific performance would not apply since these actions had been brought as suits for injunction rather than for specific performance. In effect a new type of cause of action was created, the elements of which were apparently a statement by the defendant which could be construed as a promise and a change of position, whether in reasonable reliance or not, on the part of the plaintiff.

There remained the problem of Phillips' defense of indefiniteness and uncertainty. The rule requiring that a promise be certain before it can be enforced is not only a rule of law but is one of necessity since the promise cannot be enforced without knowing what it is that has been promised. To meet this difficulty the Court of Appeals had implied certain essential terms. The term of the contract was implied to be for as long as gas was produced

and the plaintiffs should irrigate, or, in other words, a perpetual term. The price of the gas was implied to be the field price. The amount involved was implied to be whatever amount the plaintiffs wished to take for irrigation. It was held that there was certainty even when these essential terms were not specified.

The uncertain nature of the obligations sought to be enforced resulted in a situation where the judgment of the court below could not be phrased in such a way as to comply with Rule 65(d). This was not touched on by the Court of Appeals.

There was still another problem. The conversations which each of the plaintiffs had with Lewis had apparently been preliminaries to the execution of a form contract which was used by Phillips for supplying gas to their lessors. This form contract contained a termination clause which would have precluded the plaintiffs from obtaining the relief sought. A peculiar dilemma arose. The plaintiffs were in the position of urging that the negotiations had not gone far enough to warrant a reference to the form contract to supply missing terms of Phillips' obligation, but that there had been sufficient negotiations to warrant the enforcement of an obligation more favorable to plaintiffs than the ones for which they had been negotiating. Neither court nor counsel for plaintiffs were able to reconcile this theoretical difficulty.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals to the effect that a unilateral promise may be enforced as a continuing contract of sale when the term, price and quantity involved are not specified is in conflict with decisions of this Court, of other Courts of Appeals, and of the Supreme Court of Oklahoma.

(a) A holding that a statement may be enforced as a continuing contract of sale without reference to term, price or quantity was necessary to the decision of the Court of Appeals.

The opinion of the Court of Appeals held that the "oral agreements" were not void for indefiniteness and states specifically that the element of quantity would be "implied" to be the amount reasonably necessary for the operation of the well during the irrigation season. Phillips raised the objections that there was no provision for the term of the obligation or for the price of the gas to be sold, but the Court of Appeals did not touch on this.

There was no contention at any time during the progress of the cases that Lewis had represented or made any statement regarding the term, quantity and (except possibly as to Buster) the price of the proposed gas sale agreement. Yet the trial court entered its judgment decreeing in effect that Phillips should furnish gas for the life of production and during irrigation, at a reasonable

price, and in such quantities as the plaintiffs might desire for irrigation. These judgments purported to enforce oral agreements between Phillips and the plaintiffs.

In view of these facts, the Court of Appeals must have held that there could be an enforceable obligation for the sale of personalty over a continuing period of time without the necessity for agreeing upon the term which such agreement was to run, the price at which the sales were to be made, or the quantity to be sold.

(b) The holding of the Tenth Circuit conflicts with the decisions of this Court, of other Courts of Appeals, and of the Supreme Court of Oklahoma which hold that there is no enforceable promise when the term, price and quantity are not specified.

In *Wilcox & Gibbs Sewing Machine Co. v. Ewing*, 141 U. S. 627, 635, 12 S. Ct. 94, 35 L. Ed. 882, this Court refused to enforce an instrument as a binding exclusive distributorship contract, holding that there was merely a principal-agent relation, terminable at will. The Court intimated that had a definite term been specified, the result would have been different. See also *Willard, Sutherland & Co. v. United States*, 262 U. S. 489, 43 S. Ct. 582, 67 L. Ed. 1086 (no quantity specified).

There are numerous cases from the Courts of Appeals to the effect that sale contracts which would be continuing in their nature are unenforceable for indefiniteness

where there is no term, price or quantity specified. For example, in *Red Wing Shoe Co.* v. *Shepherd Safety Shoe Corp.*, (7th Cir.), 164 F. 2d 415, 418, the contract purported to endure as long as sales made on account of Shepherd "amount to a yearly average of $35,000.00." The Court of Appeals deduced that this could be interpreted as a perpetual term among other interpretations, and held:

> "This contention is sufficient proof of the indefiniteness of the contract if it had no other vulnerable feature. 'It is not often that a promise will be interpreted as calling for perpetual performance'."

The court pointed out another reason for its refusal to enforce the contract:

> "* * * If a contract does not specifically fix prices it must provide a definite method for ascertaining them. (Citation omitted.) The contract involved does not provide such a method."

For a holding that the lack of a specified quantity will render a sales contract unenforceable, see the leading case of *Cold Blast Transp. Co.* v. *Kansas City Bolt and Nut Co.*, (8th Cir.), 114 F. 77, 80, where the Court held:

> "If it (the buyer) had refused to order and take them no action could have been maintained for its failure because no court could have determined what amount it was required to take. Nor can an action be better maintained against the plaintiff for its failure to deliver the articles which the defendant has ordered because the offer contains no measure of the quantity which the plaintiff was to deliver, and consequently no agreement on its part to deliver any whatever."

Also in point is the well known class of cases known as the "will, wish or want" cases, since they hold that an agreement without a specified quantity is unenforceable, even though the parties consciously attempted to provide for an indefinite quantity. The cases involving "requirements" contracts are not in point since there was no agreement, promise or representation on either side that the plaintiffs would take their requirements from Phillips.

Other cases holding that want of term, price or quantity renders an obligation unenforceable, and thus conflicting with the holding of the Court of Appeals are:

National Importing and Trading Co. v. Clark, (2d Cir.), 270 F. 54, 56-57, (price);

McArthur v. Rosenbaum Co. of Pittsburgh, (3d Cir.), 180 F. 2d 617, 619 (term);

Louisville Soap Co. v. Taylor, (6th Cir.), 279 F. 470, 479, cert. den. 259 U. S. 583, 42 S. Ct. 586, 66 L. Ed. 1075, (price);

Canadian Nat'l. Ry. Co. v. George M. Jones Co., (6th Cir.), 27 F. 2d 240, 242, (price);

Curtiss Candy Co. v. Silberman, (6th Cir.), 45 F. 2d 451, 452 (term, price, quantity, by reference to 68 F. Supp. 717, 722);

American Cotton Oil Co. v. Kirk, (7th Cir.), 68 F. 791, 792 (quantity);

Weston Paper Manufacturing Co. v. Downing Box Co., (7th Cir.), 293 F. 725, 727-728 (price).

Jordan v. *Buick Motor Co.*, (7th Cir.), 75 F. 2d 447, 449-450 (term, quantity);

Anderson & Brown Co. v. *Anderson*, (7th Cir.), 161 F. 2d 974, 977 (price);

A. Santaella & Co. v. *Otto F. Lange & Co.*, (8th Cir.), 155 F. 719, 722-723 (term, quantity);

Huffman v. *Paige-Detroit Motor Car Co.*, (8th Cir.), 262 F. 116, 117-118 (price, quantity);

Nebraska Aircraft Corp v. *Varney*, (8th Cir.), 282 F. 608, 610, (price);

E. I. Du Pont de Nemours & Co. v. *Claiborne-Reno Co.*, (8th Cir.), 64 F. 2d 224, 228, 233, cert. den. 390 U. S. 646, 52 S. Ct. 644, 76 L. Ed. 1295 (term, see the second appeal, 77 F. 2d 565, 568);

Terre Haute Brewing Co. v. *Dugan*, (8th Cir.), 102 F. 2d 425, 426 (term or quantity);

Meredith v. *John Deere Plow Co.*, (8th Cir.), 185 F. 2d 481 (term, quantity);

Maple Island Farm, Inc. v. *Bitterling*, (8th Cir.), 209 F. 2d 867, 878-879, cert. den. 348 U. S. 882, 75 S. Ct. 123, 99 L. Ed. 694, reh. den. 348 U. S. 921, 75 S. Ct. 290, 99 L. Ed. 722, (term);

Boeing Airplane Co. v. *NLRB*, (D. C. Cir.), 174 F. 2d 988 (term, see discussion in 193 F. 2d 470, 474).

There are other cases to the same effect.

Among the above cited cases are so-called "exclusive distributorship" contracts, which are especially in point. In those contracts the seller promises to sell and the buyer,

agreeing to the purported contract, proceeds to change his position in reliance upon the seller's promise, spending sums of money for such things as advertising, stores, displays, and other things calculated to build up a demand for the articles which he has arranged to buy. In such cases the agreements are uniformly held unenforceable where there is the lack of a specified term, price and quantity.

Such is also the rule in Oklahoma. A case which illustrates the conflict between the cases at bar and the Oklahoma rule is *Dunn* v. *Birmingham Stove & Range Co.*, 170 Okl. 452, 44 P. 2d 88, 89, in which the court, holding that an exclusive distributorship contract without an expressed duration was unenforceable, stated the rule as follows:

> "The general rule as to contracts of the nature here involved is that, where the contract itself provides no definite period of time it shall remain in force, the law presumes it shall last as long as both parties desire and terminate at the will of either party."

Other cases showing that the Court of Appeals directly conflicts with the Oklahoma Supreme Court are:

Rogers v. *White Sewing Machine Co.*, 59 Okl. 40, 157 P. 1044, 1045-1046;

Arkansas Valley Town & Land Co. v. *A. T. & S. F. Ry. Co.*, 49 Okl. 282, 151 P. 1028, 1032;

Foster v. *Atlas Life Insurance Co.*, 154 Okl. 30, 6 P. 2d 805, 808;

Forster-Davis Motor Co. v. *Slaterbeck*, 176 Okl. 395, 98 P. 2d 17, 19;
Barnsdall Refining Co. v. *Desmond*, 173 Okl. 177, 46 P. 2d 913, 915.

The above conflicts cannot be resolved by "implying" the essential terms of an agreement as the Tenth Circuit has attempted to do. It was not the intent of the parties that a perpetual obligation should be created to sell gas at a reasonable price for the life of production and in such quantities as desired by the plaintiffs. Neither Lewis nor any other agent of Phillips had any such intent. The plaintiffs could not have reasonably thought this to be the case, for they knew that there were written contracts to be signed and they could not assume anything as to the terms of these contracts without ascertaining them. If they had, they would have been found to provide for termination by either party. They could not have reasonably expected that Phillips would gratuitously obligate itself to supply gas perpetually at the will of the plaintiffs.

The Court of Appeals cites four Oklahoma cases in support of its holding that the agreements were definite[2]. These cases do not sustain the decision; therefore it did not follow state law.

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[2] *Harlow Pub. Co.* v. *Patrick*, 181 Okl. 83, 72 P. 2d 511; *Oklahoma Portland Cement Co* v. *Pollock*, 181 Okl. 266, 73 P. 2d 427; *Webb* v. *Moran*, 186 Okl. 140, 96 P. 2d 308; *Brown* v. *Bivings*, (Okl.), 277 P. 2d 671.

In the *Patrick case* there was no continuing obligation and further, the amount and time of performance were clearly specified in writing. The defendant was to pay $100.00 on December 1, 1929.

In the *Pollock* and *Webb cases* the term was somewhat unusual in each case but was clearly specified and was definite. In *Pollock* it was for the rest of plaintiff's natural life. In the *Webb case* it was until certain cotton could be sold at 10¢ per pound profit to the defendant. The *Brown case* apparently holds directly contrary to the principle for which the Court of Appeals cites it. In its opinion the Oklahoma court stressed the fact that no duration had been agreed on, referring to such fact three times. It then held the contract was void for uncertainty.

We respectfully and earnestly submit that a careful and analytical reading of the opinion of the Court of Appeals will reveal that its decisions in the cases at bar directly conflict with numerous state and federal decisions, and that it sets a precedent for creating arduous and perpetual obligations to which the parties never intended to become bound.

II.

If the decision of the Court of Appeals be distinguished on the basis of promissory estoppel, then the cases at bar stand for a novel, erroneous and far reaching extension of the promissory estoppel doctrine.

In the preceding proposition it was pointed out that the decision of the Court of Appeals is in conflict with cases from this Court, other circuits and Oklahoma. Admittedly these cases dealt with ordinary contracts and not with promissory estoppel. If it be said that the cases at bar are distinguishable from the cited cases by reason of being based on promissory estoppel then the holding of the Tenth Circuit assumes a most unusual aspect.

The decisions in the cases at bar are an unheard of extension of the doctrine of promissory estoppel. It is true that many courts have held that contracts may be formed by means of an estoppel in cases where there was a promise that would have been enforceable but for the absence of the technical elements of consideration, or a writing. *Porter* v. *Commissioner of Internal Revenue*, (2d Cir.), 60 F. 2d 673, 675, aff'd 288 U. S. 436, 53 S. Ct. 451, 77 L. Ed. 880.

We have been unable to find a single case in which promissory estoppel was used to impose a continuing obligation to sell goods on the basis of a promise or statement where there was no expression as to the term, price

and quantity of the alleged obligation. Nor do we find any cases involving other types of obligations where an indefinite and uncertain promise was enforced by estoppel.

The promissory estoppel situations require certainty for the same reasons as do ordinary promises. No reasoning or authority can be found to the contrary. In fact, even stricter rules should be applied to estoppels because of the ease with which they can be fabricated.

For example, in *Lacy* v. *Wozencraft*, 188 Okl. 19, 105 P. 2d 781, the only case remotely in point which was cited by the Court of Appeals for its estoppel theory, the usual requisites of a contract were present. In that case the promisee, relying on a promise to renew her lease at the same rental as before for three more years, made expenditures in reliance on such promise. The decision was in favor of the promisee, but the requirements of certainty were met: the term was three years and the rental was to be the same as before. There was a meeting of the minds, an offer and acceptance, and clearly the intention of both parties at the time of the oral transaction was that there would be a contract of lease between them, and the terms and conditions of it were understood.

In the cases at bar, there was no certainty, no intent on the part of Lewis for Phillips to be bound, and no bargain. Further, there was no reasonable reliance, since plaintiffs knew there was a form contract to be signed and Lewis made no representation as to its terms. The

mere fact that plaintiffs made expenditures has no bearing on the terms on which they reasonably relied. Buster, the Hitches, and eight others drilled wells without relying on a perpetual term (R. 100, 112, 119, 131). If these persons deemed it expedient to expend money relying only on a one-year supply of gas, then how can the court say that the fact of expenditures implies reliance on a perpetual term? In view of this it appears that the Court of Appeals has eliminated the element of reasonable reliance from the doctrine of promissory estoppel.

It is imperative that this holding of the Court of Appeals be reviewed because of its far reaching consequences affecting basic principles of contract law relied on by business men everywhere. Under the cases at bar any statement of intention to make a contract in the future may be enforced as an estoppel. Any oral obligation may be extended to a perpetual term by testimony that the promisee has changed his position in reliance on such a term, even if the promissor never made a promise for such a term and never would have done so.

Under the two cases at bar it is now unnecessary to prove the elements of a contract or to bring one's case within the rules pertaining to the enforcement of promises. It is necessary only to prove the making of a statement indicating the general intention to enter into a contract and the rest of the essential and material terms of the obligation may be implied, even though it is inconceivable

that the promissor would have agreed to such terms. An obligation may be imposed without the necessity for showing a reasonable reliance thereon.

This cannot be the correct law, for if statements indefinite and uncertain as to term, price and quantity cannot be relied upon by a party giving consideration of the usual type, then they cannot be reasonably relied on by one who changes his position in order to establish a promissory estoppel.

These considerations are far reaching in their effect on business and commerce, and if this Court refuses to review the decisions of the Court of Appeals, the law throughout the Tenth Circuit will be as follows:

Any party who is negotiating a sale contract and who manifests his intention to sell goods, not mentioning essential terms such as term, price and quantity, will be bound to a contract the terms of which are as favorable as possible to the adverse party. The promisee need only expend money and state that such expenditures were in reliance upon the promise and the additional terms of the contract will be implied. The price will be that price expected by the promisee. The quantity will be such quantity as he desires to take (although he obligates himself to take none) and the term will be perpetual, or during the life of the business of both parties.

There can be no preliminary negotiations. The entire contract must be made at one and the same time; other-

wise the buyer could change his position in reliance on the seller's avowed willingness to sell and write his own contract, merely by testifying that he relied on certain terms.

It will be necessary to expressly negate any undesirable term to avoid it, rather than following the accepted practice of assuming that one is not bound to a term unless he expressly agrees to the same. This is explicit in the opinion of the trial court where it was held that the term of the obligation was perpetual for the reason that Lewis had failed to say that the proposed contracts contained a termination clause (R. 34).

III.

Under the facts in these cases any alleged obligation of Phillips would be unenforceable under the applicable law of specific performance, and the decision of the Court of Appeals that such law of specific performance would not apply to an injunction suit conflicts with the decisions of this Court and of other Courts of Appeals.

(a) A holding that injunction against breach of an obligation is not equivalent to specific performance thereof was necessary to the decision by the Court of Appeals.

The lower court having found that Phillips had entered into "oral agreements", the judgments were attacked upon the grounds of want of mutuality of obligation and remedy. The Court of Appeals held that this defense lacked merit for the reason that it was a de-

fense only to actions for specific performance of agreements and these cases were not such. The Court of Appeals said:

> "Most of the cases cited in support of the contention were cases for specific performance. In Oklahoma, in order to be subject to enforcement by an action for specific performance a contract or agreement must be mutual in respect to obligations and remedy (citation omitted) and specific performance will not be decreed where an executory contract or agreement leaves it optional with one of the parties whether he will proceed with the contemplated enterprise (citations omitted) *but these were not actions for specific performance of the oral agreements.* They were actions to enjoin threatened refusal to discharge an obligation resting upon Phillips to furnish gas and the basis of the asserted relief was equitable estoppel." (Emphasis added.)

This quotation can mean one of two things. Either the fact that these cases involved promissory estoppel or the fact that they were injunction suits rather than specific performance had the effect of obviating the necessity for following settled Oklahoma contract law. If the former, then these cases are an anomaly in the law which is discussed under Proposition II above. If the distinguishing factor is the fact that the cases were brought as injunction suits, then the holding of the Court of Appeals must be that by bringing an action in the form of an injunction a plaintiff may evade the rules of contract law pertaining to specific performance of obligations.

That the Court of Appeals so held is further indicated by their rebuttal of Phillips' argument pertaining to the Statute of Frauds:

> "*But these were not actions for the enforcement of the oral agreements.* They were actions to restrain wrongful discontinuance of the furnishing of gas pursuant to the terms of the agreement." (Emphasis added.)

The two quotations above clearly indicate the principles adopted by the Court of Appeals and its intention to apply such erroneous principles in the future if this Court does not review the decisions.

In addition to the explicit statement by the Court of Appeals as to the principle to which they adhere, the facts and results of these cases are a square holding to the effect that injunction may be used to evade the law of specific performance. The Oklahoma law as to mutuality is clear and is recognized by the Court of Appeals. Were these actions for specific performance they must have been reversed for want of mutuality. The fact that they were instead affirmed indicates that this erroneous decision is a square holding and not a mere loose statement of principle.

(b) The above holding is in direct conflict with decisions of this Court and of other Courts of Appeals.

This Court and the courts of appeals for the circuits other than the Tenth Circuit hold that there is no dis-

tinction between an injunction against breach of an obligation and specific performance of an obligation and that the rules applicable to specific performance must be followed in suits for injunction against breach.

In *Joy v. City of St. Louis*, 138 U. S. 1, 47, 11 S. Ct. 243, 34 L. Ed. 843, this Court recognized the specific performance rule that where performance was perpetual and indefinite so that it would be impracticable for the Court to supervise the execution of the decree, the obligation would not be specifically performable. This Court felt it necessary to distinguish specific performance cases. This Court said, at page 46:

> "* * * The action of the circuit court was, in effect, to enforce the specific performance of the agreement. * * * The prayer for an injunction to restrain the Wabash Company and its receiver from refusing to permit the Colorado Company to use the right of way of the Wabash Company from the north line of the park to Eighteenth Street, is a prayer for all that is necessary to secure practically the specific performance of the agreement * * *."

This Court, 138 U. S. at pages 50-51, recognized that mutuality was necessary in this injunction suit as it was in specific performance, but found that there was no want of mutuality, that the contract could be practically supervised and affirmed the decree granting the injunction. These factors clearly show this Court's view conflicts with the cases at bar.

Since this case did not deny the injunctive relief sought, it is not unequivocally and fact for fact in conflict with the cases at bar from the Tenth Circuit. There are, however, numerous cases from the Second, Third, Fourth, Sixth, Eighth and Ninth Circuits which are directly conflicting with the cases at bar. For example, in the leading case of *Hutchinson Gas & Fuel Co.* v. *Wichita Natural Gas Co.*, (8th Cir.), 267 F. 35, 38, it was said:

> "An injunction against the breach of a contract is a negative decree of a specific performance thereof, and the general rule is that the power and duty of a court of equity to grant the former are governed by the same principles, rules, and practice as are its power and duty to grant the latter relief."

This case was one for injunction against breach of a natural gas purchase contract and the Court applied the specific performance rule that mutuality of remedy and obligation is essential, 267 F. at 39, holding that the decree dismissing the bill for injunction must be affirmed for the reason that there was no mutuality of remedy and obligation.

This decision squarely conflicts with the decisions of the Court of Appeals in the cases at bar.

The following cited injunction cases are also squarely conflicting with the Tenth Circuit, both on their facts and in principle, as expressed by the Courts of Appeals. The citation of each case will be followed by a citation to a page containing language stating that injunction against

breach is equivalent to specific performance; additional page references are citations to language showing that the particular court applied specific performance law in an injunction case. The application of specific performance rules in an injunction case is in effect a holding in conflict with the decision in the Tenth Crcuit.

Capetta v. *Atlantic Refining Co.*, (2d Cir.), 74 F. 2d 53, 55, cert. den. 294 U. S. 730, 55 S. Ct. 639, 79 L. Ed. 1260;

York Haven Water & Power Co. v. *York Haven Paper Co.*, (3d Cir.), 201 F. 270, 277-278, 278-279;

Simmons Co. v. *Crew*, (4th Cir.), 84 F. 2d 82, 86, 84-85, cert. den. 299 U. S. 569, 57 S. Ct. 32, 81 L. Ed. 419;

United Fuel Gas Co. v. *Swiss Oil Corporation*, (6th Cir.), 41 F. 2d 4, 7, 6-7, 7;

Shubert v. *Woodward*, (8th Cir.), 167 F. 47, 53, 55, 56, 57, 61;

Engemoen v. *Rea*, (8th Cir.), 26 F. 2d 576, 578, 578, 579, 579, cert. den. 278 U. S. 627, 49 S. Ct. 28, 23 L. Ed. 546;

General Petroleum Corporation of California v. *Beanblossom*, (9th Cir.), 47 F. 2d 826, 828, 828.

We find seven other cases to the same effect.

This conflict between circuits cannot be justified on the basis of state law, for the principle of the foregoing cases is enunciated by two Oklahoma decisions, *Kolachny* v. *Galbreath*, 26 Okl. 772, 110 P. 902, 906; *Warner* v. *Page*, 59 Okl. 259, 159 P. 264, 266.

This question should be reviewed. It would have decisive effects upon the substantive rights of litigants were the decision of the Court of Appeals allowed to stand. A plaintiff may bring his case within or without the law pertaining to specific performance by the simple expedient of suing for specific performance or for injunction against breach.

How may one rely upon the law of specific performance when it can be avoided by a plaintiff at will? It is certainly legitimate to ascertain whether a proposed obligation is to be specifically performable before entering into it. We find no case holding that all sale contracts are specifically performable at the option of the buyer, yet the *Buster* and *Hitch Land Company cases* are square holdings to that effect.

It is respectfully submitted, therefore, that these cases, in addition to being in direct conflict with the decisions of this Court and other circuits, have such a great potential, if they should be followed, for disrupting the law and customs of commerce, that such reason alone merits the exercise by this Court of its *certiorari* jurisdiction.

IV.

The decision of the Court of Appeals is in conflict with Rule 65(d).

Rule 65(d) of the Federal Rules of Civil Procedure provides in part:

"Every order granting an injunction * * * shall be specific in terms. * * *"

The judgments of the trial court enjoin Phillips "from disconnecting plaintiffs' gas line, connecting their water well * * * with defendant's producing gas well * * * located on said land; and from refusing or failing to permit the use and purchase by plaintiffs at a reasonable price during the continuance of such irrigation, from gas produced on said land, of such amount of natural gas as is reasonably necessary for such irrigation on said land" (R. 42, 252).

As an example of the vagueness of these judgments we call attention to the provision relating to price. What is meant by "a reasonable price" is ascertainable, but only by litigation. The purpose of the judgment is to determine the rights of the parties and not to present new and further questions of fact which can be resolved only by the intervention of judge or jury.

A party who is enjoined to sell goods at a "reasonable price" is in the position of having to bow to any demand of his vendee for the reason that he is under constant peril of contempt proceedings for violation of the injunction. He is unable to ascertain in advance what the trier of fact will determine a reasonable price to be.

This is illustrated in the cases at bar where the plaintiffs have assumed all through the cases (R. 73, 76, 80, 106) that they would pay the field price of 9.82¢ per

Mcf for the gas. This is probably not a reasonable price, for it further appears from the evidence that at such a price Phillips will lose money on the sale of natural gas to these plaintiffs (R. 139, 147), and that a public utility in the area charges nearly three times the field price (Pl. Ex. 1, R. 169, 68):

Although the opinion is silent as to this point and does not attempt to meet Phillips' argument pertaining to the violation of Rule 65(d), it is clear that the Tenth Circuit has held in effect that the above quoted judgment is consistent with Rule 65(d). Thus the decision is in conflict with the principle enunciated by the Court of Appeals for the Seventh Circuit in *Shannon* v. *Retail Clerks*, (7th Cir.), 128 F. 2d 553, 555, to the effect that Rule 65(d) is not merely directory but is mandatory and must be followed by the trial courts. Also conflicting in principle with the two cases at bar are:

Corica v. *Rugen*, (7th Cir.), 140 F. 2d 496, 499;

S. E. C. v. *Okin*, (2d Cir.), 139 F. 2d 87, 89;

Schwegmann Bros. v. *Hoffman-La Roche, Inc.*, (5th Cir.), 221 F. 2d 326, 328, cert. den. 350 U. S. 839, 76 S. Ct. 77, 100 L. Ed. 748.

Apart from the conflicts in principle between the Tenth Circuit and the cases cited above, it is of great importance that the Federal Rules of Civil Procedure should be interpreted uniformly. These judgments of the trial

court, as affirmed by the Court of Appeals are precedents which may be cited and followed throughout the country for the principle that Rule 65(d) may be evaded and ignored. This Court should further its purpose by reviewing those decisions which deviate from the proper interpretation of the Federal Rules.

CONCLUSION

It is respectfully submitted that a Writ of Certiorari should be granted and that the decisions of the Court of Appeals should be reversed with instructions to render judgments for Phillips.

Respectfully submitted.

RAYBURN L. FOSTER,
HARRY D. TURNER,
R. M. WILLIAMS,
WILLIAM J. ZEMAN,
Phillips Building,
Bartlesville, Oklahoma;

CECIL C. HAMILTON,
REFORD BOND,
1211 First National Building,
Oklahoma City, Oklahoma,
Attorneys for Petitioner.

JUNE, 1957.

APPENDIX A

Opinion
(January 2, 1957)

William J. Zeman (Rayburn L. Foster, Harry D. Turner, R. M. Williams, and Cecil C. Hamilton were with him on the brief) for Appellant.

V. P. Crowe (Orlando Sweet, William J. Holloway, Jr., Tryon & Sweet, and Embry, Crowe, Tolbert, Boxley & Johnson were with him on the brief) for Appellees.

Before BRATTON, Chief Judge, and PICKETT and LEWIS, Circuit Judges.

BRATTON, Chief Judge.

These four cases—filed in the state court and seasonably removed to the United States court on the ground of diversity of citizenship with the requisite amount in controversy—present for determination questions relating to injunctive relief to prevent threatened disconnecting of certain deep water wells used for the irrigation of farm lands in Oklahoma from gas lines of a major producing oil and gas company. The cases are numbered 5309, 5310, 5311, and 5312, in this court. In Number 5309, Robert W. Buster and his wife were plaintiffs below; in Number 5310, H. C. Hitch, Jr., and wife, and John B. Gray and wife were plaintiffs; in Number 5311, Henry C. Hitch and wife were plaintiffs; and in Number 5312, The Hitch Land and Cattle Company, a corporation, Harry H. Hitch, and Bill Logsdon were plaintiffs. In all of the cases, Phillips Petroleum Company, a corporation, and A. M. Rippel, manager of the natural gas department of Phillips Petroleum Company were defendants. The defendant Rippel was a nominal party and no further reference will be made to him. The cases will be referred to as the Buster, the Hitch, Jr., the Hitch, Sr., and the Hitch Land Company cases, respectively; and the parties will be referred to as plaintiffs and Phillips, respectively.

Although the cases were consolidated for trial, the court made separate findings of fact and conclusions of law in each case. In the *Buster case*, the court made these findings of fact. Plaintiffs owned a tract of land in Texas County, Oklahoma, containing 160 acres. Phillips held oil and gas leases covering the land and had a producing gas well thereon, known as the Mayoe well.

Dale Lewis was the field superintendent of Phillips. In about December, 1952, Lewis represented, promised, and agreed with plaintiffs that if they completed the drilling and equipping of an irrigation well on such land, Phillips would provide natural gas produced from the Mayoe well in the amount reasonably necessary for the operation of the water well. In reliance upon such representation, promise, and agreement, and upon the custom, practice and policy of Phillips and other companies having producing gas wells in the vicinity of the land upon which the Mayoe well was located to permit the purchase and use at reasonable prices of gas for the operation of irrigation wells, plaintiffs subsequently completed their well. The completing and equipping of the well cost about $17,000, more than $10,000 of which was expended subsequent to and in reliance upon the representation, promise, and agreement made by Lewis for Phillips. Phillips had notice and knowledge of the expenditures made by plaintiffs in completing the drilling and equipping of the well. On or about January 15, 1953, Phillips installed the valve for the connection of the water well to the gas line of Phillips for the receipt of gas for the operation of the irrigation well; and from the time of such connection, Phillips had notice and knowledge of such use of gas. Natural gas produced on the land owned by the plaintiffs at a reasonable price was the only fuel the use of which would permit irrigation for agricultural purposes of such land with reasonable assurance of profit; and until about July, 1953, it was the general custom, practice, and policy of Phillips and other companies having producing gas wells in the vicinity of the land owned by plaintiffs to permit the purchase and use of natural gas at reasonable prices and in such amounts as were reasonably necessary for such irrigation operations. By letter dated July 23, 1953, Phillips advised plaintiffs that unless the connection between the irrigation well and the gas line from the Mayoe well was severed before September 1, 1953, Phillips would make the disconnection and would thereafter refuse to permit the purchase and use of gas produced from such well for the operation of the irrigation well. In the *Hitch Land Company case*, the court made these findings. Plaintiff The Hitch Land Company owned a tract of land in Texas County, containing 160 acres; plaintiff Harry H. Hitch owned a tract containing 320 acres; and plaintiff Logsdon was the tenant farming both tracts for agricultural purposes. Phillips held oil and gas leases covering such land and had

a producing gas well thereon, known as the Timmons well. In about January, 1953, Lewis represented, promised, and agreed with plaintiffs that if they undertook the drilling and equipping of an irrigation well on such land, Phillips would provide natural gas produced by the Timmons well in the amount reasonably necessary for the operation of such irrigation well. In reliance upon such representation, promise, and agreement, and in reliance upon the custom, practice, and policy of Phillips and other companies having producing gas wells in the vicinity of the lands owned by plaintiffs to permit the purchase and use of natural gas at reasonable prices for the operation of irrigation wells, plaintiffs drilled and equipped the irrigation well on such land at a cost of approximately $14,000 and made further expenditures for preparation of the land for irrigation and purchase of equipment for such purpose amounting to approximately $15,000. From and after about April, 1953, Phillips permitted plaintiffs to purchase natural gas from the Timmons well reasonably necessary to operate the water well used for irrigation purposes. In other material respects, the court made findings of fact substantially identical with those made in the *Buster case*. In the *Hitch, Jr., case*, the court made these findings of fact. Plaintiffs owned a tract of land in Texas County, containing 320 acres. Phillips held oil and gas leases covering the land and had a producing gas well thereon known as the Knott well. Until about July, 1953, it was the general custom, practice, and policy of Phillips and other companies having producing gas wells in the vicinity of the land owned by plaintiffs to permit the purchase and use of natural gas at reasonable prices and in such amounts as were reasonably necessary for irrigation operations from gas wells on irrigated lands. In reliance upon such custom, practice, and policy, plaintiffs drilled and equipped an irrigation well on their land at a cost of approximately $14,000 to $15,000, and made further expenditures for the equipment of such well of about $10,000 to $12,000, with further expenses in the preparation of the land for irrigation, thereby making a total investment of about $25,000. The irrigation well was completed in the spring of 1953, and from that time Phillips permitted plaintiffs to purchase and use gas from the Knott well to operate the irrigation well. In all other material respects, the court made findings of fact identical or substantially so with those made in the *Buster* and the *Hitch Land Company*

case, except that the court did not find that Phillips ever represented, promised, and agreed that if plaintiffs undertook the drilling and equipping of the well for irrigation purposes Phillips would provide for the operation of such well gas produced from the Knott well, or that Phillips took any part in effecting the connection of the irrigation well with the gas line of Phillips. In the *Hitch, Sr., case*, the court made these findings of fact. Plaintiffs owned a tract of land in Texas County, containing 640 acres. Phillips held oil and gas leases covering the land and had thereon a gas producing well, known as the Place well. Until about July, 1953, it was the general custom, practice, and policy of Phillips and other companies having producing gas wells in the vicinity of the land of plaintiffs to permit the purchase and use of natural gas at reasonable prices and in such amounts as were reasonably necessary for such irrigation purposes from gas wells on irrigated land. In reliance upon such custom, practice, and policy, plaintiffs drilled and equipped two irrigation wells on their land and made further expenditures for the preparation of the land for irrigation at a total outlay of about $45,000. From and after the completion of such wells in about the middle of 1951 and the fall of 1952, respectively, Phillips permitted plaintiffs to purchase and use natural gas from the Place well reasonably necessary to operate the two irrigation wells. In all other material respects, the findings of fact were substantially identical if not completely identical with those made in the *Buster case* and in the *Hitch Land Company case*, except that the court did not find that Phillips ever represented, promised, and agreed with plaintiffs that if, they undertook the drilling and equipping of the wells for irrigation purposes, Phillips would provide gas for such purpose from the Place well, or that Phillips participated in any manner in effecting the connection of the irrigation wells with the gas line of Phillips. The court made identical conclusions of law in the several cases. The court concluded as matters of law that Lewis had authority to make the representation, promise, and agreement; that by reason of its representation, promise, agreement, and conduct, Phillips was obligated to permit plaintiffs to purchase and use gas produced from the gas wells for the operation of the irrigation wells; that plaintiffs would suffer irreparable injury if the irrigation wells were disconnected from the gas lines; that Phillips was estopped to deny or repudiate its obligation to furnish gas for the operation of the irrigation wells;

that Phillips was estopped to assert the statute of frauds; and that injunctive relief should be granted. In each case, the court entered judgment enjoining Phillips from disconnecting the gas line connecting the well of plaintiffs from the gas line of Phillips and from failing or refusing to permit the purchase and use at a reasonable price and in a quantity reasonably necessary for the operation of the irrigation well owned by plaintiffs. 133 F. Supp. 594. Separate appeals were perfected but the several cases were submitted in this court on a single record.

The judgments are challenged upon the ground that Lewis lacked authority to enter into the oral agreements in respect to the furnishing of natural gas for the operation of the irrigation wells. In the *Buster* and the *Hitch Land Company cases*, the court found that oral agreements were entered into, but in the *Hitch, Jr.*, and the *Hitch, Sr., cases*, the court did not make such findings and the record is completely barren of evidence indicating that in those cases agreements of that kind were entered into. Therefore, this contention and all other contentions subsequently considered concerning the oral agreements relate only to the *Buster* and the *Hitch Land Company cases*. The headquarters of Phillips are located in Bartlesville, Oklahoma. Lewis had been in the employ of the company for more than ten years. He resided at the Hansford plant of the company, held the position of area superintendent, was in charge of the company offices in Texas County, and had field men under his supervision. The Sherman and Harsford gathering systems were within his area. They included the gas fields of the company in Texas County. And it was the general custom and practice for farmers and owners of land in the area to deal with Lewis as the agent and representative of Phillips. It is the law in Oklahoma that apparent authority exists when the principal, by statement or conduct, either places the agent in position in which he appears with reasonable certainty to be acting for the principal, or without interference suffers the agent to assume such position so that third persons are justified in believing that he is acting within his authority. *Rosser-Moon Furniture Co. v. Oklahoma State Bank*, 192 Okl. 169, 135 P. 2d 336; *Knapp v. Ottinger*, 206 Okl. 113, 240 P. 2d 1083. Having held Lewis out to the public as its agent with apparent authority to act for it in respect to ordinary local matters arising within the area of which he was superintendent, Phillips cannot be heard to challenge his authority to enter into

the oral agreements even though the instructions given Lewis were to refer to the home office of the company for action all applications or requests for gas with which to operate irrigation wells, unless plaintiffs had notice or knowledge of such instructions. *Guardian Foundation* v. *Turner*, 191 Okl. 313, 129 P. 2d 592. And the court did not find that at the time the agreements were entered into plaintiffs had any such notice or knowledge.

The judgments are challenged upon the further ground that the oral agreements were at most mere agreements to make future contracts without any meeting of the minds of the parties. The evidence presented sharp conflicts in respect to the substance of the oral agreements. But the court resolved the conflicts. In each instance, the court found in substance that by the oral agreement the parties intended to reach and did reach a present understanding that if the well was drilled or the drilling completed and water was found gas would be supplied for the operation of the well. The court found in effect that by entering into the oral agreements the parties made present commitments and assumed immediate obligations rather than merely agreeing to enter into a future contract. The findings of the court in that respect are supported by substantial evidence and are not clearly erroneous. Therefore they must stand on appeal. Accordingly, there is no sustainable factual basis in the record for the contention that by the oral agreements the parties merely agreed to enter into effectual contracts later. . .

The judgments are attacked upon the additional ground that the oral agreements were unenforceable for indefiniteness and uncertainty. Harmonizing in full measure with the general principle of law obtaining elsewhere, it is the rule in Oklahoma that the destruction of contracts or agreements for vagueness and uncertainty is disfavored; and that if a contract or agreement is sufficiently definite and certain in its totality that the intention of the contracting parties can be ascertained with reasonable certainty, it is not void for indefiniteness and uncertainty even though it fails to enter into all of the details respecting the subject matter, especially where there has been partial performance. *Harlow Publishing Co.* v. *Patrick*, 181 Okl. 83, 72 P. 2d 511; *Oklahoma Portland Cement Co.* v. *Pollock*, 181 Okl. 266, 73 P. 2d 427; *Webb* v. *Moran*, 186 Okl. 140, 96 P. 2d 308; *Brown* v. *Bivings*, ___ Okl. ___, 277 P. 2d 671. The oral agreements each related only to the furnishing

of natural gas for the operation of the water well located on the land of plaintiffs. The quantity of gas to be furnished was the amount reasonably necessary for the operation of the well during the irrigation season. And the gas was to be furnished from the line of Phillips on the land of plaintiffs. These constituent elements were implicit or implied in each agreement. And viewed in the light of them, the agreements were sufficiently definite to enable the court to fix a reasonably exact meaning of its terms. Therefore, the agreements were not fatally infirm for indefiniteness and uncertainty.

Another ground of attack upon the judgments is that the oral agreements lacked mutuality of obligation. The channel of the argument is that there was no agreement in respect to the term or duration of the agreements; that there was no agreement respecting the extent or length of time plaintiffs would irrigate their lands; that there was no agreement concerning the volume of gas plaintiffs would take; that there was no agreement that plaintiffs would not change to some other type of fuel; that they could take or not take gas at their own whim or caprice; and that in the event they should cease to take gas, Phillips would be without recourse of remedy. Most of the cases cited in support of the contention were cases for specific performance. In Oklahoma, in order to be subject to enforcement by an action for specific performance, a contract or agreement must be mutual in respect to obligations and remedy. *Thompson* v. *Giddings*, ___ Okl. ___, 276 P. 2d 229. And specific performance will not be decreed where an executory contract or agreement leaves it optional with one of the parties whether he will proceed with the contemplated enterprise. *Superior Oil & Gas Co.* v. *Mehlin*, 25 Okl. 809, 108 P. 545; *Sohio Petroleum Co.* v. *Brannan*, 205 Okl. 1, 235 P. 2d 279. But these were not actions for specific performance of the oral agreements. They were actions to enjoin threatened refusal to discharge an obligation resting upon Phillips to furnish gas, and the basis of the asserted relief was equitable estoppel. The oral agreements for the furnishing of gas for the operation of the water wells having been entered into with the mutual intent and purpose that plaintiffs would act in reliance thereon, plaintiffs having acted in such reliance by making substantial expenditures in the drilling or the completing of the drilling of the wells and in preparing the land for irrigation, and plain-

tiffs being in reasonably certain danger of suffering irreparable injuries for which there would be no adequate remedy at law if the furnishing of gas were discontinued, equity finds support in the law of Oklahoma for intervening and restraining the threatened discontinuance of the furnishing of gas. *Lacy* v. *Wozencraft*, 188 Okl. 19, 105 P. 2d 781; *Holland* v. *Ross*, 189 Okl. 428, 117 P. 2d 798.

The remaining attack upon the judgments predicated upon asserted invalidity of the oral agreements is that such agreements were void under the statute of frauds. The statute of frauds of Oklahoma provides among other things that an agreement which by its terms is not to be performed within one year from the making thereof shall be invalid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged, or by his agent. 15 O. S. 1951 § 136. But these were not actions for the enforcement of the oral agreements. They were actions to restrain wrongful discontinuance of the furnishing of gas pursuant to the terms of the agreements. And having entered into the agreements with the mutual intent and purpose that plaintiffs would act in reliance thereon, plaintiffs having acted in that manner, and it being reasonably certain that plaintiffs will sustain irreparable injuries for which they do not have any adequate remedy at law if the furnishing of gas is discontinued, Phillips is estopped to invoke the statute of frauds. *Lacy* v. *Wozencraft*, *supra*.

The judgments in the *Hitch, Jr.*, and the *Hitch, Sr.*, cases are assailed upon the ground that the court erred in holding that by reason of custom, practice, and policy, Phillips was obligated to furnish gas for the operation of the irrigation wells. As previously stated, the court found in each of these cases that until July, 1953, it was the general custom, practice, and policy of Phillips and other companies having producing gas wells in the vicinity of the land owned by plaintiffs to permit the purchase and use of gas at reasonable prices and in amounts reasonably necessary for irrigation operations from gas wells on irrigated lands. Evidence was adduced tending to show that Skelly Oil Company furnished gas for the operation of six irrigation wells, and there was evidence that several farmers used gas for the operation of their irrigation wells. But the evidence was general and did not extend into details respecting the terms or conditions upon which such gas was sup-

plied, either by Skelly or other companies. Excluding the cases involved here, Phillips in only eight instances furnished to farmers gas for the operation of irrigation wells. In each of those instances, the furnishing of the gas was covered by a written contract which was explicit in respect to quantity, measurement, delivery, price, payment, indemnity, force *majeure*, and assignment. And each contract expressly reserved to either party the right to terminate the contract at the expiration of one year from the date thereof or on any anniversary date thereafter by giving to the other party thirty days notice in writing of an intention to do so, after which each party should be released from all further liability thereunder. In no instance did Phillips assume a continuing obligation to furnish gas indefinitely with no right of termination reserved unto itself. In order to have pertinence or be effective to establish an obligation or duty on the part of Phillips to furnish gas to plaintiffs, custom, practice, or policy must be predicated upon facts and circumstances fairly comparable to those presented here. And in the absence of evidence tending to establish the existence of a custom, practice, or policy arising out of facts and circumstances fairly similar in general aspects to those presented here, we fail to find any basis for the conclusion that custom, practice, or policy, enjoined upon Phillips the asserted obligation to furnish gas to plaintiffs for the operation of their irrigation wells.

Finally, the Legislature of Oklahoma, at its session in 1955, passed an act relating to natural gas and the use thereof on the premises from which it is produced to pump to the surface water to be used for irrigation on such premises, and for other purposes. 52 O. S. 1955, Supp. § 248, *et seq.* The act provides among other things, that every person owning or operating any well from which natural gas is produced, sold, or used off the premises on which the well is located, shall upon request, make gas available to the person engaged in agricultural activities upon such premises in sufficient quantities for the operation of irrigation pumps thereon. If the act were valid, perhaps it would be effective to require Phillips to furnish to plaintiffs gas for the operaton of their irrigation wells. But in a recently decided case, it was held that the act contravenes due process of law and therefore is invalid. *Phillips Petroleum Co. v. Corporation Commission of Oklahoma.* Okl. P.2d . Accordingly the act lends no aid to plaintiffs.

The judgments in the *Buster* and the *Hitch Land Company cases*, respectively, are severally AFFIRMED; and the judgments in the *Hitch, Jr.*, and the *Hitch, Sr., cases*, respectively, are severally REVERSED and the causes are REMANDED with directions to dismiss the actions.

LEWIS, concurring

I concur unqualifiedly in the reversal of the judgments in the *Hitch, Jr.*, and *Hitch, Sr., cases*, and concur in the affirmance of the judgments in the *Buster* and the *Hitch Land Company cases* because I cannot say that the finding of the trial court holding Phillips' promise to furnish gas to be without limitation as to time is clearly erroneous. However, I believe the record would support a finding that Phillips' promise was limited to the supplying of gas in accordance with the actual contract submitted to Buster and signed by him but subsequently rejected by Phillips. I would prefer such a finding and a consequent limitation upon the relief granted.

APPENDIX B

Judgment, Case No. 5309

First Day, January Term, Wednesday, January 2nd, 1957.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

Judgment, Case No. 5312

First Day, January Term, Wednesday, January 2nd, 1957.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Oklahoma and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

Order denying appellant's petition for rehearing

Second Day, March Term, Tuesday, March 5th, 1957.

Before Honorable Sam G. Bratton, Chief Judge, and Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

These causes came on to be heard on the petition of appellant for a rehearing herein and were submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.